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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VIRGINIA CURTIS,

Plaintiff - Appellant,

v.

WILLARD E. OSMUNSON,

Defendant - Appellee.

No. 06-35417

D.C. No. CV-04-00303-
EJL/MHWMEMORANDUM^{*}

Appeal from the United States District Court
for the District of Idaho
Edward J. Lodge, District Judge, Presiding

Submitted November 8, 2007^{**}
Seattle, Washington

Before: CANBY, GRABER, and GOULD, Circuit Judges.

Plaintiff Virginia Curtis sued Defendant Willard Osmunson, her former dentist, alleging negligence under Idaho law for failure to diagnose and treat an abscess in her mouth. The district court granted summary judgment to Defendant, ruling that Plaintiff's claim was barred by Idaho's two-year statute of limitations,

^{*} This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

Idaho Code Ann. § 5-219(4). On de novo review, Jones v. Blanas, 393 F.3d 918, 926 (9th Cir. 2004), we affirm.

1. Plaintiff argues that the injury that she suffered from Defendant's negligence was the failure of the abscess to heal after a root canal on June 17, 2002. Consequently, she reasons, the statute of limitations did not begin to run until that date, and her complaint, filed on June 15, 2004, was timely.

Under Idaho law, a cause of action for medical malpractice accrues when "objective medical proof would support the existence of an actual injury. . . . Whether there was some damage, or whether that damage was objectively ascertainable, does not depend upon the knowledge of the injured party." Lapham v. Stewart, 51 P.3d 396, 401 (Idaho 2002) (internal quotation marks omitted).

We view Plaintiff's deposition and affidavit testimony in the light most favorable to her. Jones, 393 F.3d at 926. As she alleges, Plaintiff began suffering pain as a result of Defendant's negligence no later than May 22, 2002.

Consequently, her claim accrued no later than May 22, 2002, and her complaint, filed more than two years later, is barred by the statute of limitations. The fact that the abscess later did not heal from the root canal is immaterial. See Lapham, 51 P.3d at 400 ("The limitation period is not extended by reason of any continuing consequences or damages resulting from the malpractice . . .").

2. We decline to consider Plaintiff's argument, raised for the first time on appeal, that Idaho Code Annotated § 5-219(4) is unconstitutional. See Cold Mountain v. Garber, 375 F.3d 884, 891 (9th Cir. 2004) ("In general, we do not consider an issue raised for the first time on appeal.").

AFFIRMED.